No. S224853

IN THE SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS, et al.,
Plaintiffs and Respondents,

vs.

ABM SECURITY SERVICES, INC.,

Defendant and Appellant.

After a Decision by the Court of Appeal
Second Appellate District, Division One
Court of Appeal, Second Appellate District, Case Nos. B243788 & B247392

The Superior Court of California for the County of Los Angeles
Honorable John Shepard Wiley, Jr., Judge Presiding
Superior Court Consolidated Nos. BC336416, BC345918, & CG544421

APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION (CELA) FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

and

BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION (CELA) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Unfair Competition Case – Service on Attorney General and District Attorney
[Business & Professions Code § 17209; Cal. R. Ct. 8.29]

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. R. Ct. 8.208)

The following application and brief are made by the California Employment Lawyers Association ("CELA"). CELA is a non-profit organization of attorneys and is not a party to this action. CELA knows of no entity or person that must be listed under California Rule of Court 8.208 (d)(1) or (d)(2).

Respectfully submitted,

Dated: November 20, 2015 LAW OFFICES OF LOUIS BENOWITZ

BY_____
Louis Benowitz
Attorneys for Amicus Curiae
California Employment Lawyers Assn.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The undersigned respectfully ask permission to file a brief as *amicus curiae* in support of the Respondents, on behalf of the California Employment Lawyers Association ("CELA").

Interest of Amicus Curiae

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour actions similar to *Augustus v. ABM Security Services, Inc.* CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in the California Labor Code and applicable orders of the California Industrial Welfare Commission. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters before the California Courts of Appeal and California Supreme Court.

How the Proposed Amicus Brief Will Assist the Court

CELA supports plaintiffs and respondents Jennifer Augustus, et al. However, CELA's brief does not solely focus on the facts of this particular case, but rather attempts to provide a wider-ranging perspective on the issues this case presents and its potential impact on broader jurisprudence concerning California's rest period and basic wage and hour protections.

CELA's proposed brief will assist the Court by providing additional perspective on the duty-free nature of the rest period requirement in view of Labor Code section 226.7 and the regulatory history of the Industrial Welfare Commission's ("IWC") wage orders' rest period provisions.

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CELA's proposed brief will also assist the Court by providing additional perspective on the nature of the rest period requirement in view of the California Supreme Court's decisions in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) and *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833 (*Mendiola*), and the Court of Appeal decision in *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220 (*Faulkinbury*).

Finally, CELA's proposed brief will further assist the Court by discussing the deleterious impact that allowing employers to require on-duty rest periods without obtaining exemptions from the Division of Labor Standards Enforcement ("DLSE") would have on employee rights and addressing the compliance concerns raised by defendant and appellant ABM Security Services, Inc. ("ABM") and its *amici* in this case.

California Rule of Court 8.200(c)(3) Disclosures

No Party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

Conclusion

For the foregoing reasons, this Court should grant *amicus curiae* California Employment Lawyers Association's application and file the attached amicus brief.

Respectfully submitted,

Dated: November 20, 2015 LAW OFFICES OF LOUIS BENOWITZ

BY_____
Louis Benowitz
Attorneys for Amicus Curiae
California Employment Lawyers Assn.

INTRODUCTION

Allowing employees to engage in limited activities such as reading magazines and smoking cigarettes while they remain on duty is not the same thing as completely relieving them of duty for proper breaks. In fact, California law has recognized this basic concept ever since it adopted its first set of rest period requirements in the 1930s and confirmed it again in 2000 when it enacted Labor Code section 226.7, which expressly prohibits employers from requiring their employees to work during rest periods.

This case presents this Court with the opportunity to once again reaffirm that California workers are entitled to off-duty rest periods as required by the Industrial Welfare Commission ("IWC") and the Legislature. In this case, ABM Security Services, Inc. ("ABM") never authorized its security guards to take lawful off-duty rest breaks. Instead, by its own admission, it required them to remain on duty—not only to respond to "emergencies" (as its brief suggests), but also to provide their normal guard services (such as escorting persons to their cars) "as needed." Thus, during so-called breaks, ABM's security guards had to continue performing their normal work duties "as needed"—which is precisely what ABM requires them to do when they are not on supposed breaks. In other words, ABM requires its security guards to work during their breaks.

The trial court in this case correctly concluded that this single policy is illegal. Now, ABM and its *amici* ask this Court to rule that *all* California employers are allowed to uniformly require their non-exempt employees to work during breaks.

As discussed below, California law entitles employees to off-duty rest breaks as a basic workplace protection. If this were to change, unscrupulous employers would have license to require countless California workers to work during rest periods and allow for rampant wage theft in

direct contravention of a fundamental public policy.[1]

Accordingly, to prevent these injustices, the California Employment Lawyers Association ("CELA"), as *amicus curiae* on behalf of respondents Jennifer Augustus, et al., respectfully requests for this Court to reverse the Court of Appeal's decision.

ARGUMENT

I. CALIFORNIA LAW REQUIRES EMPLOYERS TO RELIEVE THEIR NON-EXEMPT EMPLOYEES DURING THEIR REST PERIODS.

A. By Its Terms, Labor Code Section 226.7 Expressly Prohibits Employers from *Requiring* Their Employees to Work During Rest Periods, Thus Prohibiting On-Duty Rest Periods.

Labor Code section 226.7 prohibits employers from requiring their employees to work on-duty rest periods. The version of section 226.7 that applies in this case states, "No employer shall *require* any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." (*Id.*, subd. (a) [emphasis added].)[2] The subsequent amendment to section 226.7 that took effect on January 1, 2014

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[1] That fundamental public policy is set forth in Lab. Code § 90.5, subd. (a), which states:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

[2] (See Motion for Judicial Notice by *Amicus Curiae* California Employment Lawyers Association ("MJN"), Ex. 1 [Stats. 2000, ch. 876 (AB 2509) and Legislative Counsel Digest (Sept. 29, 2000)], at CELAMJN007.)

retains the language prohibiting employers from requiring their employees to work during rest periods. The Legislature enacted section 226.7 as part of a "strategy to address the problem of employees being forced to work through their meal and rest periods." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1106 (*Murphy*).)

From this, it follows that an employer violates Labor Code section 226.7 by imposing *required* job duties on its employees during rest periods. (See *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256 (*Kirby*) ["section 226.7 defines a legal violation *solely by reference to an employer's obligation to provide meal and rest breaks*" (italics added)].) This is especially so given that section 226.7 is a remedial statute "for the protection and benefit of employees, [that is] to be liberally construed with an eye toward promoting such protection." (*Brinker*, 53 Cal.4th at pp. 1026-1027 [quoting *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 702].) To construe the statute otherwise would not only contravene its express language, but also render the rest period requirement meaningless.

In construing this prohibition against requiring employees to work during breaks, it is absolutely critical to recognize that "work" extends far beyond mere physical exertion. As courts have consistently recognized, employers often hire employees for their "*instant* readiness to serve." (See, e.g., *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 976.) Thus, for employees whose duty it is to be instantly ready to serve, a break means a break from being instantly ready to serve. Using the security guards in this case as an example, their normal job duties require them to be instantly ready to serve at a moment's notice. That service can range from, for example, being ready to respond to an emergency, to being ready to escort someone to his or her car, to being ready to provide elevator access to a pizza delivery person.

While ABM and its *amici* seek to cast ABM's policy of not relieving them of duty for breaks as simply being ready to respond to emergencies as they occur (during purported breaks or otherwise), the record in this case shows otherwise. In this specific case, the trial court found that ABM had "policies mak[ing] all rest breaks subject to interruption in case of an emergency *or in case a guard is needed*." (13JA3757 [emphasis added].) It is this second piece of the trial court's finding—which ABM and its *amici* effectively ignore throughout their briefs—that is absolutely critical. Using security guards as an example, there are many ordinary and non-emergency situations where they may be "needed." In this case, the trial court recognized that non-emergency situations such as a person wanting an escort to his or her car could require a guard. (7JA2053.) Similarly, some buildings require security guards to authorize elevator access for every visitor who enters the building. Thus, events such as a pizza being delivered to a tenant can cause a security guard to be *needed* (as it is the guard's *duty* to authorize elevator access). These sorts of *non-emergencies* can occur at any point during a guard's shift and ABM's policies require its guards to *immediately* respond to them. Given these types of considerations, providing guards with compliant rest periods means excusing them for ten minutes at a time from having to provide immediate elevator access for things like non-emergency escorts and pizza deliveries.

If this Court were to endorse a policy under which guards employees could be kept on duty during their rest periods, countless other types of workers could be uniformly denied off-duty rest periods as well. For example, if a valet parking company allowed its employees to do things such as smoke cigarettes and read magazines during purported breaks, but required them to be immediately ready to park or recover patron's cars without regard to whether they are on break, they too would never be relieved of duty for rest periods. The same reasoning could be easily

applied various other jobs including, without limitation, receptionists (when waiting for calls), to salespersons (when waiting for customers), and the list goes on. Thus, for workers whose jobs require being ready to immediately respond to things as they happen, being relieved of work duty means a break from having to immediately respond to things as they happen.

Labor Code section 226.7 is intended to compensate employees when they are denied breaks because of such scheduling conditions. In *Murphy*, the California Supreme Court recognized that the premium pay requirement under section 226.7 is intended "to compensate employees for certain kinds of labor or scheduling resulting in a detriment to the employee." (*Murphy*, 40 Cal.4th at p. 1112.) This case, and others like it—where an employer schedules its employees in ways that require them to work without proper breaks and which prevent them from being relieved of duty for proper breaks—are perfect examples of where employers should be required to pay premium wages (absent an exemption from the DLSE).

Allowing employers like ABM to avoid relieving their employees of duty during rest periods would not only encourage widespread wage theft, but also yield windfalls for unscrupulous employers. Indeed, as this Court recognized in *Murphy*: "If denied two paid rest periods in an eight-hour work day, an employee essentially performs 20 minutes of 'free' work, i.e., the employee receives the same amount of compensation for working through the rest periods that the employee would have received had he or sheen been permitted to take the rest periods." (*Murphy*, 40 Cal.4th at p. 1104.) As the Court also recognized in *Murphy*, "Section 226.7 provides the *only compensation* for [this] injury." (*Id.* [emphasis added].) By providing for this remedy, the law requires employers to pay a premium for requiring their employees to work without proper rest breaks.

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Accordingly, while this brief discusses the regulatory history of the rest period requirement in the IWC wage orders and the legislative history of section 226.7, section 226.7 by its terms unequivocally shows that employers must provide duty-free rest periods if they wish to avoid paying premium wages.

B. The IWC's Wage Orders, Which Labor Code Section 226.7 Codifies, Do Not Allow for On-Duty Rest Periods and, Instead, Permit Employers to Obtain Exemptions from the Rest Period Requirements in Appropriately Limited Circumstances.

"[T]he IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.'" (*Brinker*, 53 Cal.4th at p. 1027 [quoting *Martinez v. Combs* (2010) 49 Cal.4th 35, 61 (*Martinez*)].) The IWC wage orders have always required off-duty rest periods. The IWC has historically required employers to provide off-duty rest periods. Without regard to this requirement, ABM asks this Court to allow it to require its employees to work through their breaks. This is precisely what the rest period requirements prohibit.

The rest period requirement, as set forth in the 1932 wage order, originally only applied to women and minors who were required to stand at work. That provision stated in relevant part:

> Seats of the proper height shall be provided in all places where women or minors are employed to the number of at least one (1) seat for every two women employed, and evenly distributed in that proportion. Women and minors shall be permitted to use the seats at all times when not engaged in the active duties of their occupation. As far as and to whatever extent, in the judgment of the Commission, when women and minors are required by the nature of their work to stand, a relief period shall be given every two hours of not less than ten (10) minutes. *No order or instructions shall be issued by any employer or his representative which shall conflict with the provisions of this section.*

(MJN, Ex. 2 [Wage Order 18 (Any Industry) (Dec. 4, 1931, eff. Feb. 26, 1932), § 12 (Seats and Work Tables)], at CELAMJN012.)

As the above language shows, by allowing workers to sit when not engaged in active job duties, and by separately mandating relief periods of at least ten minutes with which employers were not allowed to interfere, the IWC drew a distinction between inactive job duties and rest periods. Indeed, if the two were not distinct, the IWC only would have needed to give workers the right to relief periods every two hours without allowing them to sit "at all times" when not engaged in active job duties. Thus, the rest period regulation has required employers to provide duty-free rest periods from its earliest inception.

In 1947, the IWC extended the rest period requirement to all women and minors (and not just those required to stand at work). In doing so, it adopted language that very closely resembles the present wage orders:

> Every employer shall authorize all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. Rest periods shall be computed on the basis of ten minutes for four hours working time, or majority fraction thereof. No wage deduction shall be made for rest periods.

(See MJN, Ex. 3 [Wage Order 4R (Feb. 8, 1947, eff. June 1, 1947), § 11], at CELAMJN013.)

In connection with extending the rest period protections to employees not required to stand at work, the IWC stated: "Consideration was given to the fact that in many seated jobs *the employee has no control over the flow of the work and it is essential that the employer arrange relief for such employees*." (MJN, Ex. 4 [IWC Minutes (Feb. 8, 1947), at p. 7], at CELAMJN021.) This also shows the IWC's intent that employees be relieved from duty for rest periods (as employers would not need to "arrange relief for such employees" if on-duty rest periods were widely

permissible). (See *id.*)

Also consistent with the IWC's intent that employees be relieved of duty for rest periods is the inclusion of language providing that "[n]o wage deduction shall be made for rest periods." (See MJN, Ex. 3 [Wage Order 4R (Feb. 8, 1947, eff. June 1, 1947), § 11], at CELAMJN013.) If rest periods otherwise qualified as "hours worked," there would be absolutely no need for the IWC to include language in the wage orders prohibiting wages from being deducted for them. From this, it reasonably follows that rest periods are a time during which the non-exempt employees who are entitled to them must be relieved of duty.

The IWC additionally addressed employer flexibility concerns when it amended the wage orders in 1947. Indeed, as the IWC explained, it "considered it advisable to make the rest period provision more flexible by providing an overall amount to be allowed daily, rather than at set intervals which frequently interfere with the working schedules and do not always serve the best interests of the employees." (MJN, Ex. 4 [IWC Minutes (Feb. 8, 1947), at p. 7], at CELAMJN021.) Thus, rather than widely authorize on-duty rest periods, the IWC instead struck a balance by allowing flexibility with respect to rest period timing.

In 1952, the IWC debated an "authorize and require" standard for rest periods. In rejecting an "authorize and require" standard, the IWC recognized: "[I]f the rest-period requirement were to be made mandatory, then each employer would be in technical violation of the Order each time an employee, with or without his permission, worked during a prescribed rest period." (MJN, Ex. 5 [Reopening of IWC Order No. 1-52 for the Manufacturing Industry, Report of the Wage Board, at p. 11], at CELAMJN035.) This further shows that the IWC has consistently required employers to completely relieve their employees of duty for rest periods. Indeed, if employers could *require* their employees to work during rest

periods, no technical violation could ever result from employees *voluntarily* working during rest periods. Consequently, the IWC opted for the "authorize and permit" language found in the present wage orders. (See MJN, Ex. 6 [Wage Order 4-52 (May 15, 1952, eff. Aug. 1952), § 12], at CELAMJN039; see also MJN, Ex. 7 [Record of Proceedings – Wage Board for Order 1 (Oct. 1 & 2, 1956), at p. 9], at CELAMJN049.)

The IWC's inclusion of the term "net" to modify "rest time" in the 1980 wage orders further confirms that employers must relieve their employees of duty for rest periods. As the DLSE explained in its January 3, 1986 opinion letter:

> I have examined the records of the Industrial Welfare Commission and found that the language in Section 12, "at the rate of ten (10) minutes net rest time per four (4) hours" was developed after discussion of a proposal to extend the ten minute rest period to fifteen or twenty minutes. The point of the proposal was to insure that the employee would be free from work for ten minutes and the rest period would not include any time to walk or otherwise travel to a place of rest. Rather than adopt such a provision, the Commission opted for the term "net" to cover all the different situations involved where rest periods are concerned.

(MJN, Ex. 8 [DLSE Op.Ltr. 1986.01.03], at CELAMJN057.)

The IWC's decision to maintain the requirement that rest periods be duty-free largely stems from the fact that employers can seek exemption from the rest period requirement for employees who are already not subject to another exemption. Under the wage orders, the DLSE has the discretion to exempt an employer from the rest period requirement where it finds that an exemption "would not materially affect the welfare or comfort of employees" and that its denial "would work an undue hardship on the employer." (E.g., Cal. Code Regs, tit. 8, § 11040, subd. (17).) Because exemptions are available where warranted, the IWC has consistently

rejected making any significant changes to the rest period requirements since they were first adopted. (See, e.g., MJN, Exs. 9 [IWC, Rest Periods - Order 4-76], at CELAMJN058, 10 [Statement as to the Basis for Wage Order 5-89 (Sept. 23, 1988, eff. July 1, 1989)], at CELAMJN083.) The availability of this exemption also shows that there is no basis for reading a widely available on-duty rest period exception (as separate from the exemption) into California law.

As the IWC explained in response to employer concerns in connection with the 1976 wage orders: "In response to arguments that in some situations workers are almost continually resting while they monitor machines and cannot be spared from their places, the Commission provides for the possibility of exemptions in accord with the requirements of Section 18." (MJN, Ex. 9 [IWC, Rest Periods - Order 4-76], at CELAMJN058.) Thus, even with respect to employees whose work does not involve physically strenuous job duties, the IWC declined to make exception for on-duty rest periods as separate from the exemption.

Similarly, when the IWC reviewed the rest period requirement again in 1982 and rejected making changes to the requirement, it explained:

> As to the concerns of impracticality and economic unfeasibility, the commission does not find that the rest period provisions to be impractical or unfeasible or that the OAL criteria are not met. Moreover, Section 17 provides for exemption from the above regulation [the rest period requirement] where hardship is found.

(MJN, Ex. 11 [AB 1111 Review of Existing Regulations (Aug. 24, 1982), at p. 106], at CELAMJN077.) In sum, the IWC's consistent refusals to uniformly weaken the rest period requirement based on employer concerns because exemptions are available show that on-duty rest periods are generally impermissible.

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Moreover, the IWC's inclusion of an extremely narrow on-duty rest period exception in the 2001 wage orders confirms that there is no widely available on-duty rest period exception. In 2001, the IWC created an exception that mirrors the very standard that ABM wants this Court to apply, but limited it to certain employees who work in 24-hour residential care facilities. That exception states,

> However, employees with direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, are receiving 24 hour residential care and employees of 24 hour residential care facilities for elderly, blind or developmentally disabled individuals may, without penalty, require an employee to remain on the premises and maintain general supervision of residents during rest periods if the employee is in sole charge of residents. Another rest period shall be authorized and permitted by the employer when an employee is affirmatively required to interrupt his/her break to respond to the needs of residents.

(Cal. Code Regs, tit. 8, § 11050, subd. 12(C).)

The IWC would not have created this narrow exception if on-duty rest periods were permissible under the default rest period standard. (See MJN, Ex. 12 [Statement as to the Basis for Amendments to Wage Order No. 5 Regarding Employees Working in Group Homes], at CELAMJN078-CELAMJN081; cf. *Mendiola*, 60 Cal.4th at p. 847 [finding that presence of "sleeping period exception" language in Wage Orders 5 and 9 seriously undermined contention that the IWC intended to incorporate the same exception into Wage Order 4 where doing so would eliminate "substantial protections to employees"].)

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Further, the IWC has also shown that it knows how to exempt specific categories of non-exempt employees from the rest period requirement where it deemed it warranted. For example, the IWC has specifically exempted persons directly employed by the State and its political subdivisions from the rest period requirement. (E.g., Cal. Code Regs., tit. 8, § 11040, subd. 1(B) ["Except as provided in Sections 1, 2, 4, 10, and 20, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district."]; *id.*, tit. 8, § 11070, subd. 1(B) [same].) Similarly, the IWC has specifically exempted personal attendants from the rest period requirement where it deemed it appropriate. (*Id.*, tit. 8, § 11150, subds. 1(B), 2(J) ["Except as provided in Sections 1, 2, 4, 10, and 15, the provisions of this order shall not apply to personal attendants."].) This further shows that the IWC knows how to exempt entire categories of employees from the rest period requirements when it wishes to do so.

Finally, ABM's assertion that the IWC did not intend for certain employees to be entitled to "completely off-duty rest period[s]" solely based on an isolated statement made in the minutes of an IWC meeting from 1952 is unpersuasive. ABM relies on the following paragraph from the IWC minutes:

> The rest period provision was clarified to indicate that an employee working less than 3 ½ hours for the entire day would not need to have a rest period. It was further clarified that the Commission did not intend a completely off-duty rest period to be applicable in the case of an employee who is alone on a shift and has ample time to rest because of the nature of the work. This would be true in the case of a night switchboard operator on a small board, a night hotel clerk, etc. If employees in such positions are able to rest on the job it is not intended that the employer provide a special

relief employee.

(Evangeles Decl., Ex. D [IWC Minutes (May 16, 1952), at p. 34].)

Tellingly, the 1952 amendments to the wage orders only added language eliminating the need to authorize rest periods for employees working less than three and one-half hours. (MJN, Ex. 6 [Wage Order 5-52 (May 15, 1952, eff. Aug. 1952), § 12], at CELAMJN039.) The amendments added no language whatsoever to the wage orders with respect to the purported clarification for employees working alone. (See *id.*) Considering that the Statement as to the Basis for multiple subsequent wage orders (which is required by statute, see Labor Code section 1177, subd. (b)) is inconsistent with the regulatory history on which ABM relies, and that the wage orders themselves contain no indication that the IWC made any "clarification" to widely authorize on-duty rest periods, this Court should decline ABM's invitation to abrogate the rights of countless employees solely based on an isolated statement. This is especially so considering that doing so would run afoul of this Court's well-established policy of liberally construing the wage orders and the Labor Code to protect employees.

Accordingly, an analysis of the regulatory history of the IWC's wage orders shows that all employees are entitled to off-duty rest periods unless they fall within the limited exceptions provided for under the wage orders or work for an employer who has specifically been exempted from the rest period requirements.

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C. The *Brinker* Decision and Its Progeny Also Recognize That Employers Must Provide Duty-Free Rest Periods.

In *Brinker*, this Court recognized that rest periods must be duty free. There, the Court reversed the decertification of "a 'Rest Period Subclass,' comprising all 'Class Members who worked one or more periods in excess of three and a half (3.5) hours without receiving a paid 10 minute break during which the Class Member was relieved of all duties[.]" (*Brinker*, 53 Cal.4th at p. 1019.) Given that the Court found that the certified rest period claim on behalf of this very subclass was "eminently suited to class treatment" after finding the plaintiffs' theory of recovery viable, all while taking quarrel with the meal period subclass definition based on the theory of recovery advanced for that subclass (see *Brinker*, 53 Cal.4th at p. 1050), the *Brinker* decision confirms that employers have a duty to provide duty-free rest periods.

Consistent with the regulatory history of the rest period requirement, Labor Code section 226.7, and the *Brinker* decision, the Court of Appeal in *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220 (*Faulkinbury*) also recognized that rest periods must be "duty-free" and that there is no on-duty rest period exception as there is for meal periods. (See *id.* at pp. 236-237.) Based on this recognition, the Court of Appeal in *Faulkinbury* certified a rest period claim on behalf of security guards who, just like the class members in this particular case, were not authorized by their employer to take off-duty rest periods. Therefore, the *Brinker* decision and its progeny confirm that there is no on-duty rest period exception.

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D. Industry-Specific Considerations Do Not Change What Constitutes a Duty-Free Break Where One Is Required and, Instead, Simply Give Employers Flexibility as to the Means They Use for Providing Duty-Free Breaks.

In distinguishing between providing and requiring duty-free breaks, the *Brinker* decision struck a delicate, and proper, balance between protecting the rights of employees and the flexibility needs of law-abiding employers. To protect employees, the *Brinker* framework requires employers to pay premium wages when they fail to authorize and meaningfully provide for meal and rest periods in the manner and number that the law requires. (See *Brinker*, 53 Cal.4th at p. 1033 [imposing premium pay liability for failing to properly authorize breaks]; see also *Kirby*, *supra*, 53 Cal.4th at p. 1256 ["section 226.7 defines a legal violation *solely by reference to an employer's obligation to provide meal and rest breaks*" (italics added)].) To provide flexibility to law-abiding employers, the *Brinker* framework allows those employers reasonable discretion in deciding when breaks occur and absolves them from having to police whether their employees actually take breaks. (See, e.g., *Brinker*, 53 Cal.4th at p. 1031, 1041-1049 [recognizing reasonable flexibility as to break timing within certain parameters]; *id.* at pp. 1040-1041 [excusing employers from policing breaks or paying premium wages once breaks are properly provided].)

Where the law requires an employer to provide duty-free breaks, industry-specific considerations do not change what constitutes a duty-free break and, instead, clarify the nature of the flexibility afforded to employers. In *Brinker*, this Court stated, "What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker*, 53 Cal.4th at p. 1040.)

Critically, this Court also stated this immediately after summarizing what constitutes a duty-free meal period and what satisfies an employer's obligation to provide one. (See *Brinker*, 53 Cal.4th at p. 1040.) From this, it follows that the nature of a duty-free break will not vary from industry to industry (unless the applicable wage order for a particular industry *expressly* sets forth a different standard)[3] and that it is only the *means* used to provide a duty-free break that may vary from industry to industry.

The following comparison between office and assembly line workers illustrates this. Under the wage orders, both types of employees are entitled to duty-free breaks. For example, to provide duty-free breaks to office workers, it may suffice for the employer to clearly communicate a written policy to its workers explaining what their rights to breaks are and when they are supposed to take them. This is because many office workers can simply choose to put their work on hold to take breaks and resume it later without consequence. By contrast, for assembly line workers, their employers may need to schedule planned operational shutdowns or relief employees to provide off-duty breaks to their workers and compliant written policies alone may not suffice. This is because many assembly line workers may not be able to put their work on hold to take breaks without causing great consequence to entire industrial processes.

Similarly, if one looks at industry-specific considerations in view of ABM's legal obligations, it had several potential compliance options at its disposal. These options include, but are not necessarily limited to: (1) employing a roving guard to travel between single guard sites to relieve guards at single guard sites of duty for proper rest periods; (2) allowing

[3] The healthcare industry provides a specific example. There, the applicable wage order expressly allows employers to require their employees to remain on premises during off-duty meal periods based on industry-specific considerations. (See Cal. Code Regs, tit. 8, § 11040, subds. (2)(G), (2)(K).)

guards at multiple guard sites to completely cover for each other during rest periods so that each guard could be relieved of duty for proper rest periods; (3) obtaining and maintaining a proper exemption from the rest period requirement from the DLSE to the maximum extent permissible; (4) maintaining a policy under which guards can wait until after their rest periods to respond to any calls; (5) scheduling the end of one guard's shift at a single guard site to overlap with the next guard's shift on a rotating basis for a small portion of the shift (thus providing off-duty breaks while conceivably rendering it impracticable to provide them in the middle of each work period); and/or (6) scheduling guards to work shifts of less than 3.5 hours at a time to avoid having to provide off-duty rest periods. Thus, ABM had numerous ways to comply with California's rest period laws.

Therefore, this Court's decision in *Brinker* simply recognized that the *means* employers might reasonably use to provide off-duty breaks may vary between industries. This provides no authority for the starkly different proposition that what constitutes an off-duty break may vary between industries where two industries are subject to the same requirement that they provide off-duty breaks.

E. The Duty to Provide Duty-Free Rest Periods Does Not Require Employers to Prohibit Voluntary Work During Rest Periods.

Contrary to the characterizations of ABM and its *amici*, the requirement that employers provide duty-free rest periods does not require them to ensure that their employees do not perform work during rest periods. In distinguishing between relieving employees of duty and prohibiting them from working, the California Supreme Court explained in *Brinker*, "an employer must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work." (*Brinker*, 53 Cal.4th at p. 1034.) This Court also explained in *Brinker*,

"Indeed, the obligation to ensure employees do no work may in some instances be inconsistent with the fundamental employer obligations associated with a [rest] break: to relieve the employee of all duty and relinquish any employer control over the employee and how her or she spends the time." (*Brinker*, 53 Cal.4th at pp. 1038-1039.) Further, as discussed in Section I.B above, the IWC knew how to distinguish between voluntary and involuntary work when it rejected proposals that would have subjected rest periods to an "authorize and require" standard.

As such, an employer only incurs premium pay liability by *requiring* its employees to work during breaks. (See *Brinker*, 53 Cal.4th at p. 1040 ["Proof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay; employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability."].) Accordingly, employers do not have to ensure that their employees do not work to provide duty-free rest periods.

F. The Distinction That the Court of Appeal Draws Between Work as a Verb and as a Noun Is Untenable Because It Misconstrues the Rest Period Laws in a Way That Harms Employees and Contravenes This Court's Recent Decision in *Mendiola v. CPS Security Solutions, Inc.*

The distinction that the Court of Appeal draws between work as a "verb" and work as a "noun" completely misconstrues Labor Code section 226.7. Section 226.7 flatly prohibits an employer from requiring an employee to work during a rest period. (Lab. Code § 226.7, subd. (b).) This places the focus on the employer's conduct by its plain language and does not distinguish between different forms of "work." (Accord *Kirby*, supra, 53 Cal.4th at p. 1256 ["section 226.7 defines a legal violation solely by reference to an employer's obligation to provide meal and rest breaks."].)

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The Court of Appeal in this case *arbitrarily* chose to distinguish between "work" when used as a verb and "work" when used as a noun. (*Augustus v. ABM Security Services, Inc.* (2014) 233 Cal.App.4th 1065, 1076-1077 (*Augustus*).) The Court of Appeal stated:

> The word "work" is used as both a noun and verb in Wage Order No. 4, which defines "'Hours worked'" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal. Code Regs., tit. 8, § 11040, subd. 2(K).) In this definition, "work" as a noun means "employment" — time during which an employee is subject to an employer's control. "Work" as a verb means "exertion" — activities an employer may suffer or permit an employee to perform. (See *Tennessee Coal Co. v. Muscoda Local* (1944) 321 U.S. 590, 598 [88 L.Ed. 949, 64 S.Ct. 698] [work is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business"].)

(*Id.* at p. 1077.)

The above-quoted language shows that the Court of Appeal drew this specious distinction by relying on the federal law standard for "hours worked"—even though that standard offers less protection to employees than California law. (E.g., *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581-581 (*Morillion*) [explaining that the California "hours worked" definition is broader and more protective than the federal law definition].) This Court has repeatedly "cautioned against 'confounding federal and state labor law' [Citation] and explained 'that where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced[.]'" (*E.g.*, *Martinez*, supra, 49 Cal.4th at p. 68 [quoting *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798]; see

also *Mendiola*, 60 Cal.4th at p. 843.) Thus, the Court of Appeal drew a manufactured and incorrect distinction between "work" when used as a verb and "work" when used as a noun in direct contravention of this Court's warnings against doing so "[a]bsent convincing evidence of the IWC's intent to adopt [a] federal standard . . . which expressly eliminates substantial protections to employees[.]" (*Mendiola*, 60 Cal.4th at p. 843 [quoting *Morillion*, 22 Cal.4th at p. 592].)

By relying on a less protective federal law standard without convincing evidence that the IWC intended to do so, the Court of Appeal unjustifiably deviated from this Court's well established principles for construing wage and hour protections and fabricated a new definition for the word "work" through linguistic manipulation. As a result of doing so, the Court of Appeal erroneously concluded that an employer does not violate Labor Code section 226.7 by exercising control over an employee for its own benefit so long as it does not require "exertion" from an employee. (*Augustus*, 233 Cal.App.4th at p. 1077.) One fundamental flaw with this distinction is that requiring an employee to remain immediately ready to serve at every moment during a purported break, and to pay sufficient attention during a purported break to immediately respond to an employer's business needs, is a form of exertion. Another fundamental flaw with this distinction is the practical impossibility of drawing a line between what it means for an employer to exercise control and what it means for an employer to require exertion. This distinction will inevitably lead to employer abuses. Consequently, this Court should reject the Court of Appeal's construction of section 226.7 and instead construe it to prohibit all work during rest periods to further the statute's purpose of protecting employees. (See, e.g., *Brinker*, 53 Cal.4th at pp. 1026-1027.)

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As this Court's recent decision in *Mendiola* expressly recognizes, employers can hire employees for the benefit of having them ready to serve and make them ready to serve by exercising significant control over their activities. (*Mendiola*, 60 Cal.4th at pp. 840-842.) This Court's *Mendiola* decision also recognizes that allowing employees to engage in some personal activities is not tantamount to employees being able to effectively use their time for their own purposes and being relieved of control and duty. (E.g., *id.* at p. 840.) This necessarily means that an employer can require an employee to work by requiring the employee to be ready to serve while exercising sufficient control over the employee to prevent the employee from effectively using time for his or her own purposes. (See *id.*)

CONCLUSION

For the reasons set forth herein, *amicus curiae* CELA respectfully requests for this Court to affirm the reverse the Court of Appeal's decision with respect to the issues encompassed by the grant of review.

Respectfully submitted,

Dated: November 20, 2015 LAW OFFICES OF LOUIS BENOWITZ

BY_____

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CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.520(c)(1), counsel for *Amicus Curiae* hereby certifies that the Brief of California Employment Lawyers Association (CELA) as Amicus Curiae in Support of Respondents is proportionately spaced, uses Times New Roman 13-point typeface, and contains 6,791 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate of Compliance, as determined by the Microsoft Word® for Mac 2011 word count feature.

Respectfully submitted,

Dated: November 20, 2015 LAW OFFICES OF LOUIS BENOWITZ

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PROOF OF SERVICE

1. I am a citizen of the United States and am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to the within action. My business address is 9454 Wilshire Boulevard, Penthouse, Beverly Hills, California 90212.

2. I am familiar with the practice of the Law Offices of Louis Benowitz for collection and processing of correspondence for mailing with the United States Postal Service. It is the practice that correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

3. On November 20, 2015, I served the attached **APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION (CELA) FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS** and **BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION (CELA) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS** in this action by placing a true and correct copy thereof, enclosed in sealed envelope(s) addressed as follows:

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[XX] BY MAIL I caused such an envelope to be mailed by depositing it with the United States postal service with the postage prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct to the best of my knowledge.

EXECUTED on November 20, 2015, at Los Angeles, California.

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Louis Benowitz
Declarant

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